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CEASEFIRE BETWEEN THE BRANCHES:

A COMPACT IN FOREIGN AFFAIRS

Those who serve in government, especially when under attack, are likely to be conscious—somewhat defensively perhaps—of the spirit of the old Spanish proverb: “It is not the same to talk of bulls, as to be in the bullring.” The memory of that sentiment has had some bearing on my observations from the safe distance of private life. It has commended a focus on institutional problems—those that transcend partisanship.

One such issue deserves special, constant attention. It is the distribution within our government of authority for foreign affairs.

The country has already struggled at length with this issue. The ordeals of Vietnam and Watergate exposed grave perils to our constitutional structure—an accumulation of vast power in the President’s hands, and room for enormous abuse. Congress responded by passing a great deal of legislation, and some might think the issue settled.

I think otherwise. On the basis of four years in the Department of State, I believe the methods of operation now in place leave us poorly equipped to conduct the kind of foreign policy our country requires in a complex, turbulent, dangerous world. We have not yet resolved the dilemma posed by our need to reconcile the imperative of democracy at home with the demands of leadership in the world.

So it is encouraging that the issue is being reopened. Specifically, two leaders in the Congress, the Chairman of the Senate Armed Services Committee, Senator John Tower, and the Chairman of the Senate Foreign Relations Committee, Senator Charles Percy—writing respectively in *Foreign Affairs* and *Foreign Policy*—have

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raised questions about the existing equation.¹

As it happens, both Senator Percy and Senator Tower belong to the same party as the President. While they achieved a significant degree of impartiality, the truth is that we have not yet been able to exclude political considerations from these discussions. As a wise man once said, "Where you stand often depends on where you sit."

Thus, it would be quite ordinary for a Democrat to have advocated a stronger presidency for Mr. Carter, while now endorsing greater restraints upon President Reagan. After all, President Carter needed enough power to do what was "right"; President Reagan, on the other hand, needs to be kept from "mistakes."

But as Americans as well as partisans, it is important to think institutionally as well as politically. Perhaps that process will be advanced if people who are no longer in office speak out about how power should be shared. So I propose to downplay, for the moment, my doubts about where President Reagan is leading us, and to concentrate instead on the means by which our course is set—on what role the Executive, the Congress and the courts should play to preserve a rational system of balances and checks among the three branches.

I do this in these pages less to declare conclusions than to invite further discussion—to share some experiences and thoughts on the distribution of power in foreign affairs, and to suggest that all who have been concerned with the issue should now devote additional, careful attention to it.²

Before turning to some thoughts for the future, it is worth looking at the way the courts and the Congress have recently related to the Executive on international matters.

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As to the courts, Alexis de Tocqueville once said that, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." That was true of the major issues of presidential power faced in the four years of the Carter Administration. It is quite stunning that five significant

¹ John G. Tower, "Congress Versus the President: The Formulation and Implementation of American Foreign Policy," *Foreign Affairs*, Winter 1981/82; and Charles H. Percy, "The Partisan Gap," *Foreign Policy*, Winter 1981/82.

² The distinct perspectives of the Executive and the Congress have been amplified in a number of important articles including Lee H. Hamilton and Michael H. Van Dusen, "Making the Separation of Powers Work," *Foreign Affairs*, Fall 1978; Douglas J. Bennet, Jr., "Congress in Foreign Policy: Who Needs It?" *Foreign Affairs*, Fall 1978; Lloyd N. Cutler, "To Form a Government," *Foreign Affairs*, Fall 1980; and Charles McC. Mathias, Jr., "Ethnic Groups and Foreign Policy," *Foreign Affairs*, Summer 1981.

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foreign policy decisions of that period were challenged in the courts—and were brought to final decisions within President Carter's term or shortly after it ended. The resolution of those issues brought the basic judicial doctrines on foreign affairs authority into sharp focus.

In the early part of his Administration, President Carter spent a great deal of his political capital—which, given his narrow electoral margin, was already in short supply—on gaining approval of the two Panama Canal Treaties and of legislation to carry them out. Indeed, Clark Clifford, perhaps our most sophisticated observer of presidential power, thought he spent too much. The constitutional requirement for ratifying treaties—two-thirds of those present, or as many as 67 out of 100 Senators—is a difficult standard, and the Administration had to struggle for almost every vote. In all, some 21 reservations, conditions or amendments were affixed to the Treaties before they were approved.

Among other things, the ratification struggle required negotiation, with the active involvement of the Senate leadership, of the so-called DeConcini condition, named for the Senator from Arizona. That condition gave the United States the right to take in Panama whatever steps it deemed necessary to reopen the Canal if it were closed. The DeConcini condition inflamed Panamanian nationalism, and it was necessary to work out additional language in the second Treaty providing that the rights reserved to the United States did not allow intervention in Panama's internal affairs.

But even after the Treaties were ratified, the battle was not over. Sixty members of the House of Representatives filed suit challenging the constitutionality of the transfer of the Canal. The Congressmen based their argument on Article IV, Section 3, clause 2 of the Constitution which provides that the Congress "shall have Power to dispose of . . . Territory or other Property belonging to the United States." They contended that this clause proscribes dispositions of U.S. property by self-executing treaties, which are ratified by the Senate only. Rather, they said the action of both Houses of Congress is required.

In upholding the transfer, the Court of Appeals for the District of Columbia Circuit distinguished the property clause from those provisions of the Constitution which are by their terms exclusive, such as the grant to Congress of the power to appropriate funds.³ The court concluded that in the international setting, the

³ *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir. 1978) cert. denied, 436 U.S. 907 (1978).

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treaty power is another constitutionally permissible means of transferring property owned by the United States to other countries. The Supreme Court declined to hear the case.

President Carter's decision in December 1978 to downgrade our relations with Taiwan and recognize the People's Republic of China provided another significant test of presidential power. The President's termination of the Mutual Defense Treaty with Taiwan was challenged on constitutional grounds by Senator Barry Goldwater and others. Their lawsuit contended that since a treaty cannot go into force without the consent of the Senate, the termination of a treaty should also require either the same two-thirds majority of senators present, or else the concurrence of majorities in both the House and the Senate.

The U.S. District Court for the District of Columbia agreed with the Senators,⁴ but their theory fared badly on appeal. The Court of Appeals for the District of Columbia Circuit held that President Carter acted within his powers. Though citing a variety of factors in its decision, the court relied heavily on the fact that the treaty itself contained a termination clause, which was without conditions or designation as to who could exercise it. The court said the "President's authority as Chief Executive is at its zenith when the Senate has consented to a treaty that expressly provides for termination on one year's notice."⁵

This "on-the-merits" analysis was rendered unnecessary by the Supreme Court, which ordered that the original complaint be dismissed.⁶ Four Supreme Court Justices concluded that the case presented a "non-justiciable" political question and a fifth concluded that the case was not "ripe" for review because Congress had not formally challenged the President's action. A sixth Justice concurred in the result, and a seventh dissented from the view that the issue was non-justiciable, agreeing with the Court of Appeals that the President clearly had power to act.

A third court test of presidential power raised the issue of distinguishing between treaties, which require Senate approval for ratification, and executive agreements, which do not. The challenge was to President Carter's 1977 decision to return to the people of Hungary the "Holy Crown of St. Stephen." The crown had been given to Stephen by Pope Sylvester in 1000 A.D., when Hungary became a state in the international system of Europe; thus, it had great symbolic importance to the people of Hungary.

⁴ *Goldwater v. Carter*, 481 F. Supp. 949 (1979).

⁵ *Goldwater v. Carter*, 617 F.2d 697, 708 (D.C. Cir. 1979).

⁶ *Goldwater v. Carter*, 444 U.S. 996 (1979).

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In 1945, lest it fall into other hands, the Hungarian Commander of the Crown Guards entrusted the crown to the United States for safekeeping. President Carter's decision to return it prompted opposition from a number of Hungarian nationals and a lawsuit by Senator Robert Dole, who contended that the agreement was either a modification of an old treaty, or else a new treaty, and therefore required approval by two-thirds of the Senate.

In rejecting Senator Dole's action, the District Court for Kansas concluded that this particular transaction "has the indicia of an Executive Agreement."⁷ On appeal, however, the Court of Appeals for the Tenth Circuit, relying on *Baker v. Carr*, the landmark case on "political questions," held that the controversy was of a political character not susceptible to judicial handling.⁸ It said the court had "no way of ascertaining the interests of the United States, or of its people, in the controversy." The Supreme Court did not hear the case.

A fourth case involved the Iran hostage settlement agreements, the Declarations of Algiers, and the disposition of billions of dollars in Iranian assets which had been frozen by President Carter in November of 1979, after the American Embassy in Tehran and the Embassy's personnel were seized. The hostage settlement provided that a portion of those assets would be returned to Iran, and that the underlying claims asserted against those assets would be settled by an Iran-U.S. Claims Tribunal, out of a replenishable security fund provided by Iran for that purpose.

In formulating the hostage agreements, the U.S. negotiators had been very conscious of the limits of presidential power. Yet the negotiating situation and the time constraints seemed to rule out action by the Congress. Therefore, it was vital to cast the agreements in a way that would permit action by the President alone. But a company that had perfected a claim against Iran subsequently challenged the President's action, claiming it exceeded his powers.

The President was upheld unanimously by the Supreme Court.⁹ The central questions were whether the President could, on his own, nullify attachments, order the transfer of Iranian assets, and suspend the enforceability of claims against Iran in U.S. courts. While the Court found specific statutory authorization for the

⁷ *Dole v. Carter*, 444 F. Supp. 1065, 1070 (1977).

⁸ *Dole v. Carter*, 569 F.2d 1109 (10th Cir. 1977). See *Baker v. Carr*, 369 U.S. 186 (1962).

⁹ *Dames & Moore v. Regan*, 453 U.S. 654, 680, 688 (1981).

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President's treatment of the assets, it found none for the suspension of claims in U.S. courts. Nevertheless, it said that the statutes indicated Congressional acceptance of wide leeway for the President to settle claims against foreign countries. It was crucial that "Congress has implicitly approved the practice of claim settlement by executive agreement" by, among other things, adopting the International Claims Settlement Act of 1949 to allocate and distribute funds resulting from such settlements. This was part of a long history of Congressional acquiescence in such settlements without the advice or consent of the Senate.

It also was important that the hostage settlement agreement provided an alternative channel, the Iran-U.S. Claims Tribunal, for settling the claims. And, significantly, the Court noted that the settlement was "a necessary incident to the resolution of a major foreign policy dispute between our country and another."

The fifth case involved Philip Agee, a former employee of the Central Intelligence Agency. It is widely known that members of the CIA operate abroad "under cover." Mr. Agee adopted the practice of publishing the names of Americans abroad who, he said, are employees of the CIA. Every person so identified became a candidate for expulsion and sometimes a target for assassination. After much deliberation Secretary of State Cyrus Vance revoked Agee's passport, and Agee challenged his power to do so.

Agee contended, first, that the regulation under which his passport was revoked exceeded the power delegated by the Congress in the Passport Act of 1926. He also maintained that the revocation of his passport impinged upon his constitutional rights, in particular his Fifth Amendment due process right and right to travel and his First Amendment right of free speech.

In 1980 the lower courts agreed with Agee's contention; in 1981, however, the Supreme Court reversed.¹⁰ It noted a long history of Executive discretion in granting, withholding or revoking passports, and relied on subsequent Congressional enactments in the passport area as evidence that Congress had approved regulations asserting authority to withhold passports on national security or foreign policy grounds. On the constitutional claims, the Court held that the right to hold a passport—involving "the freedom" of international travel as opposed to the different "right" to travel domestically—is subordinate to national security and foreign policy considerations and thus subject to reasonable governmental regulation. And the Court held that Agee's campaign against the

¹⁰ See *Agee v. Vance*, 483 F. Supp. 729 (1980), affirmed in *Agee v. Muskie*, 629 F.2d 80 (1980); reversed in *Agee v. Haig*, 453 U.S. 280 (1981).

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CIA involved not only speech, but also conduct, which is not afforded First Amendment protection.

In all five of these cases, the validity of an action of the Executive Branch in a foreign policy matter was challenged. And in each case, the challenge was rejected by the courts. While the judicial reasoning differed from case to case, the outcome in all instances was to let the President have his way.

It is evident that cases involving foreign affairs raise, in the words of Justice Rehnquist in the hostage settlement case, searching questions about "the manner in which our Republic is to be governed." They remind us that we have a government characterized by what Alexander Hamilton called "vibrations of power." The cases came to the courts for decision precisely because the distribution of authority in our government is not exactly defined.

The results reflect the tradition of judicial deference to Executive action in the field of foreign affairs. As Chief Justice Burger said in the *Agee* case, "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." When a foreign policy action is challenged, courts exhibit an almost instinctive wariness. They readily question the "standing" of the parties, resort to the "political question" or "ripeness" doctrines, or search for an indication of Congressional authorization.

Courts may be particularly hesitant to intervene where, as in three of the cases mentioned, the suits are commenced by individual Congressmen or small groups of members, rather than by Congress as a whole. In such circumstances, judges may feel that the lawsuits reflect the failure of those bringing the actions to sustain their viewpoint in the Congress.

On foreign policy matters, the deference of the courts to the President is, I think, healthy. We should expect, and welcome, somewhat closer judicial scrutiny of the other branches when, as in the *Agee* case, First Amendment issues are involved. But as a general proposition, the judicial system is not well suited for a major role in the foreign policy realm.

However, looking at the relationship between the President and the courts scarcely begins the analysis. It is revealing that all of the five court cases involved the allocation of power between the President and the Congress. And that is where the real fight has been.

The best time to bring such a compact into operation would be the commencement of a new Administration after a national election, or perhaps after a Congressional election. The sense of unity and national purpose which usually marks such periods would provide the best environment for seeking the mutually reinforcing commitments and mutually accepted restraints described above. The forum for confirming such undertakings could be a meeting between a broad range of Congressional leaders and the President and key national security officials, perhaps somewhat comparable in composition to the day-long meeting held by President-elect Carter at the Smithsonian Institution in December 1976. Thereafter, a small group (perhaps the Secretary of State and bipartisan leaders from both Houses) could be charged with monitoring observance of the compact and identifying potential violations.

If the general concept of the compact is thought to have merit, it could usefully be ventilated by a special hearing of the Senate Foreign Relations Committee or the House Foreign Affairs Committee. Or one of the many institutes dedicated to foreign affairs might draw together a group of scholars and public officials to probe its premises and discuss implementation.

Whatever the next step, I believe such a new compact is needed, not to rearrange our system, but to refine it slightly, so that the framers' ingenious plan may continue to both embrace democracy and effectively defend it.

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